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IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1991

JOHN V. ESPOSITO, et al.,

Petitioners,

v.

THE SOUTH CAROLINA COASTAL COUNCIL, et al.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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ATTORNEYS FOR PETITIONERS

QUESTIONS PRESENTED

(1) Does a State land-use regulation, enacted pursuant to the State's police power, require compensation under the United States Constitution if it totally eliminates the value of private property?

(2) Does a State land-use regulation, enacted pursuant to the State's police power, require compensation under the United States Constitution if it eliminates all use of private property other than the right of occupancy, and eliminates all current economic value of the property?

(3) Does an assertion by a State legislature that it is seeking to prevent public harm, when analysis of its stated reasons reveals that it is in fact seeking

to achieve what it views as a public benefit, serve properly to create the "essential nexus" that the Nollan decision requires between State ends and means if a State property regulation is not to violate either the Due Process clause or the Takings Clause of the Fifth Amendment?

LIST OF PARTIES

The parties below were, as Plaintiffs, JOHN V. ESPOSITO, RONALD W. DOSTAL, EDWARD J. SHANNON, DR. JOSEF F. STULAC, II, EDWARD D. ESPING AND BETTY B. ESPING, DENNIS LOWES, JOYCE KLEPCHICK, ROBERT L. MCKIBBEN, MARY W. LANCASTER AND LOUISE S. DUNCAN, DR. LOUIS B. GILHAM, JR. AND JO ANNE GILHAM, JAMES A. WARRAN AND MARJORIE B. WARREN, JAMES A. WARREN, JR., WILSON TISON AND BARBARA TISON, MARION HERING, DR. WILLIAM J. SCMALZ, AND LISA L. SCHMALZ, MARGARET E. CREAGH, DR. WILLIAM R. JARVIS AND DR. JANINE M. JASON, RICHARD A. ENGLISH, AND MERTLAND M. HEDGES, III, AND DR. WALTER M. BOEHM, GLADYS HARMS, DR. JEFF HOLLOMAN, JAY FIORILLO AND DEBORAH FIOLILLO, DR. JOHN P. HEARD AND ELLEN W. HEARD AND CHARLES F. HEARD, AND MICHAEL J. DAUGHERTY AND KAREN A. DAUGHERTY, DR. SHERMAN GANS AND ELINOR GANS, AND BARNEY

CHAVOUS AND ODESSA CHAVOUS; AND AS DEFENDANTS, THE SOUTH CAROLINA COASTAL COUNCIL, a South Carolina governmental agency, and all of its members, agents, employees, representatives, successors and assigns, and JOHN C. HAYES, III, CHAIRMAN of the South Carolina Coastal Council, and H. WAYNE BEAM, Executive Director of the South Carolina Coastal Council.

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THE SOUTH CAROLINA COASTAL COUNCIL, et al.

Respondents.

PETITION FOR WRIT OF CERTIORARI

The Petitioners John V. Esposito, et al. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Fourth Circuit Court of Appeals of 3 July 1991 and its denial of rehearing and rehearing en banc of 6 November 1991.

OPINIONS BELOW

The opinion and judgment of the Fourth Circuit dated 3 July 1991, includ-

ing the dissenting opinion of Judge Hall, is reported at 939 F.2d 165 (4th Cir. 1991), 60 U.S.L.W. 2065, and 21 Envt'l. L. Rep. 21,249. It is reprinted herein as the first item in the Appendix; included with it is the brief Order denying rehearing. The opinion and judgment of the District Court for the District of South Carolina in the Chavous v. S.C. Coastal Council case is reported at 745 F.Supp. 1168 (D.C.S.C. 1990), and 20 Envt'l. L. Rep. 20,919, and is reported as the second item in the Appendix herein. The Esposito, et al. v. S.C. Coastal Council case is apparently unreported, and is reproduced herein as the third item in the appendix.

STATEMENT OF JURISDICTION

The jurisdiction of the District Court was founded on 28 U.S.C. § 1331 and the doctrine of pendant claim jurisdic-

tion, the case raising issues under the Fifth and Fourteenth Amendments to the United States Constitution. The Supreme Court has jurisdiction to review decisions of the Courts of Appeals on certiorari pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part that "private property [shall not] be taken for public use without just compensation." It is made applicable to the States through the Due Process clause of the Fourteenth Amendment.

The relevant parts of the South Carolina Beachfront Management Act, 188 Act No. 634, S.C. Code §§ 48-39-10 et seq. (1990 Cum. Supp.), as amended by 1990 Act

No. 607, are set forth in the Appendix as item four.

STATEMENT OF THE CASE

Two cases, consolidated by the Fourth Circuit for purposes of appeal, are here involved; both raise the same underlying issue (whether the South Carolina Beachfront Management Act (the Act) applied to the properties constitutes a taking), but in different form.

In the **Chavous** case, the landowner had purchased for $110,000.00 a lot on Hilton Head Island, South Carolina, and had expended considerable sums of money for architectural plans and the like in anticipation of construction in reliance upon the existing regulatory scheme, he and his wife were then told that he could

not build upon his land at all due to the passage of the Act.

In the **Esposito** case, the landowners had existing homes on Hilton Head Island; all the landowners involved had property upon which no rebuilding would be permitted under the Act were the homes to be destroyed ("destruction" was defined as two-thirds demolished in unpublished regulations at the time). This had the effect of making the properties with improvements unsalable, and of destroying current economic value - e.g., none of the properties could be further borrowed against, and all investment-backed expectations of the landowners were demolished. Prior to the enactment of the Act the values of these lots with improvements ranged between $450,000.00 and $205,000.00. After the Act their values could not be established since no sales had taken place; the only

remaining use for the properties was for the landowners to occupy them "as is."

After passage of the Act the various Plaintiffs filed suit in the U.S. District Court for the District of South Carolina, seeking either invalidation of the Act as applied to their properties or compensation. The District Court found that there was no Due Process violation as to any of the properties, and that there was no violation of the Takings Clause so far as the Esposito plaintiffs were concerned. It found a taking as to Chavous, found that the Eleventh Amendment barred compensation from the State of South Carolina, and entered an injunction against enforcement of the Act regarding Chavous and his heirs and assigns, specifying that the injunction was to "run with the land."

The Fourth Circuit affirmed the District Court on the Due Process claims, and

ruled that the substantial amendment of the scheme in 1990 rendered moot the portion of the judgment awarding Chavous injunctive relief, despite the provisions of the amendatory Act which gave it only prospective application and specifically stated that it would not "affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of [the amending act, which was 25 June 1990, well after the commencement of the Chavous lawsuit]." Judge Hall dissented.

REASONS FOR GRANTING THE WRIT

(I) This Court has granted Certiorari in Lucas v. South Carolina Coastal Council, No. 91-453, a case in which the South Carolina Supreme Court by a 3-2 decision ruled the same Beachfront Manage-

ment Act here raised not to have constituted a taking in circumstances indistinguishable from those in the Chavous case herein, and different from those in the Esposito case only in that the lots involved in Chavous and Lucas had not been improved.

This Court granted certiorari on 18 November 1981 in the Lucas case. The same Act involved in Lucas is involved in this case. The Fourth Circuit majority opinion avoids the most egregious aspects of the Lucas opinion of the South Carolina Supreme Court in that it does not equate nuisance law with a non-nuisance related exercise of the police power. The Fourth Circuit finds an "essential nexus" between the State's interest and the means chosen to achieve that interest, and says that it is following the analysis in Keystone Bituminous Coal Association v. DeBenedict-

is, 480 U.S. 470 (1987) and Nollan v. California Coastal Commission, 483 U.S. 825 (1987).

At the very least, the different approaches of the two Courts (the Fourth Circuit and the South Carolina Supreme Court) to the takings analysis of this Court would justify considering both cases together, so that this Court can provide guidance regarding the proper approach. Petitioners maintain, as is more fully set forth below, that the approach of the Fourth Circuit ignores or minimizes the actual teaching of this Court in Nollan and Keystone; although the Fourth Circuit nominally paid heed to those cases, it in fact twisted them to achieve validation of an enormously burdensome regulatory scheme. This Court could fruitfully utilize the varying patterns of effect had by the Act upon the Lucas, Esposito, and

Chavous plaintiffs to delineate with greater precision than it has heretofore the contours of Fifth Amendment applications. This would give the Court an opportunity to clarify the relationship between due process and takings analysis (the lower courts found no due process violation) while it addressed the takings clause problems.

(II) The Fourth Circuit's opinion constitutes a substantial departure from this Court's teachings in Nollan and Keystone.

The Fourth Circuit panel majority, as is pointed out in part by the dissent, overlooked the economic loss suffered by the Plaintiffs. Even if a regulation is otherwise for a proper purpose, if it "goes too far" it is a taking.

The panel majority, although partially utilizing the Nollan formulation regarding takings, nonetheless further overlooked the absence of any "nexus" between the purposes of the regulation in question and the effect of the regulation; absent that nexus, the regulation must fail.

Plaintiffs respectfully submit that the cases overall support that the following is a proper formulation of the present law of takings:

> (1) A governmental regulation will deny due process or be a taking if it does not substantially advance a legitimate, substantial governmental interest. This requires that there be a close "fit" or nexus between the governmental act and the goal sought to be achieved, so that interference with development rights and use rights is minimized; evaluating the

availability of alternative methods of achieving the goal without imposing the restrictions on the property owner is a part of this aspect of the analysis.

(2) A government regulation will be a taking even if it is otherwise valid (substantially advances a legitimate, substantial governmental interest), if it too substantially interferes with the right of the owner to use his land.

The regulation here involved is irrational. It certainly does not create a close fit between its means and the achievement of a legitimate governmental objective other than the objective of

clearing structures from the beach,[1] which is not a legitimate police power objective, although it may be a permissible public purpose in the context of the exercise of the power of eminent domain.[2]

Even if this is not so, the economic impact of the legislation is devastating. It is uncontradicted in the record that

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[1] The State has claimed that the property owners will still be able to exclude people from their property. Since they cannot erect structures thereon, it is difficult to see just how they are going to do this other than by sitting out with a shotgun or a cellular phone for contacting the police.

[2] The State's reference to wetlands cases is inapposite, since good scientific evidence was produced in the records of those cases to show that the destruction of wetlands had deleterious effects beyond the area destroyed, and potentially on the entire population. This case has only to do with the risk assumed by individual property owners when they choose to erect (or not erect) structures on their land near the ocean. There is absolutely no evidence of harm to the public from the existence of any of these structures.

the legislation has rendered the property unmarketable; no one wishes to buy property upon which no building can take place or upon which existing structures cannot be replaced. Since the properties are unsalable, the equity in the properties is not available for use by the owners - it is not diminished, it is destroyed. To say that this is a "market effect" of the legislation is simply to agree with the point that the Government has destroyed the market and hence the value of the property. Every legitimate investment-backed expectation[3] regarding these prop-

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[3] And the expectations are legitimate. At the time these properties were bought and the majority had construction placed on them no public enactment inhibited them in the slightest, and the market and the regulatory climate clearly indicated to purchasers that the property was suitable for development. As the dissent pointed out, "I believe that a person could have purchased one of the affected properties with the reasonable expectation that his investment would not be affected

erties has been annihilated by this action hiding behind the rhetoric of the police power.[4]

FACTUAL DISCUSSION

The uncontradicted evidence in the case shows that all Plaintiffs lost all economic value of their property. The

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by a drastic change in long-term land use policies." (Slip Op. at 15)

[4] The State has attempted to claim that there is a social loss from payment of insurance claims in the event of sudden disaster along the coast, citing Hurricane Hugo in its support. This is nonsense. Subsidized insurance is undoubtedly a cause of substantial coastal construction. However, if the government wants to get out of the business of subsidizing hazard insurance along the coast, there is absolutely nothing in the world to stop its doing so. (Indeed, it largely has done so.) The point is that the landowners make the risk - benefit decision based on the availability or nonavailability of insurance, and its cost. The State government cannot claim social harm from the existence of the insurance program, and if it could, the remedy would be to do something about the insurance program, not to penalize individual landowners. A social cost should be borne by society, not by a few singled-out landowners.

Esposito Plaintiffs did retain the ability to enter their houses and remain there so long as they were not destroyed; the evidence is uncontradicted that they had intended their use of the lots in question as investments as well as for personal occupancy. After passage of the regulation they could not utilize the equity in the houses, either by borrowing against it or by selling the houses, so that they had lost every economic use of the property other than the right of occupancy. Mr. and Mrs. Chavous had lost even that; they bought their lot, incurred architectural fees for plans for their projected home (intended as an investment as well as for personal use), applied for a building permit before the effective date of the regulation, and then were told that they could not build on their lot at all after

the Act passed. They were thus deprived of any economic interest whatsoever.[5]

Chavous Case

The stipulated facts establish that the Chavouses have no economic value left in their land; the only value is whatever personal pleasure (under the circumstances

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[5] The majority of the panel feels that the Chavous case has been rendered moot by the fact that the State has amended its statute. Plaintiffs would note in passing that there is an internal contradiction between this holding and the approach taken in Footnote 3 of the majority opinion regarding the Esposito case. More fundamentally, the passage of the amendments to the Act did not render the injunctive relief granted Chavous moot. The injunctive relief permitted him to build a home pursuant to pre-existing law (his projected home met all zoning and other like regulatory requirements), a situation clearly still viable; if the Coastal Council had felt that the amendments made a difference they could have moved to alter the injunction or otherwise acted. The effect of the panel action is to place the burden of going forward improperly upon Chavous, for no reason immediately appearing in law. Additionally, it vitiates the collateral estoppel effect of the District Court's decision, upon which Chavous is entitled to rely.

more than outweighed by the personal harm suffered resultant from the deprivation) they might be able to derive from going to the land and looking out at the ocean from it. There is no economic value in such land.

Additionally, the stipulated facts show outright and continuing economic loss. The reasonable investment-backed profit expectations the Chavouses entertained involved the construction of a private home thereon (the only use permitted under the system of restrictions in effect thereon) and its use by them and by others on a rental basis, and its eventual resale or, of course, passage on by testamentary distribution. Instead, they cannot even borrow money against the property, let alone resell it. There is no market for the property, and the Chavouses must continue to pay the mortgage they

initially got on the property as well as property taxes.

There has been total defeat of their reasonable investment-backed expectations, and their property has been rendered totally without value in economic terms. They cannot use it for profit (historically land on Hilton Head was a profitable investment and making a profit was one of their expectations), and cannot even make use of the economic value tied up in it. Although the State has not condemned the money that they have used and must continue to use to service the property, it has effectively required them to pay and continue to pay these monies for no return, and the tax money goes directly to State entities.

The other part of the takings formula (Nollan's close relation between means and ends, infra) also indicates that the Cha-

vous land has been taken. However, the Chavous situation is so clear on the front end already discussed that the most logical thing to do seems to be to include discussion of the "fit between ends and means" for Chavous in with discussion of the Esposito case.

Esposito Case

The Esposito case is reminiscent of Hodel v. Irving, 107 S.Ct. 2076 (1987). In that case, the government had destroyed the ability to devise property (or have it go by intestate descent), while permitting the then present owner either (a) to continue to utilize it for his own purposes or (b) to make an inter vivos transfer. That, of course, was a taking. Here, the government has kindly permitted the owner to continue in possession and purported ownership of the fee of the property, with all the current obligations that involves

(payment of taxes, insurance, etc.), while effectively removing from the property its alienability. Since alienability is an essential incident of the ownership of property,[6] destruction of it is certainly destruction of something just as important as the rights of descent and devise.

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[6] This seems sufficiently obvious as to require no citation. One can look, if one wishes, at 61 Am Jur 2d Perpetuities and Restraints on Alienation §100. This Court has eschewed a literal interpretation of "property", instead adopting a more expansive approach described in Pruneyard Shopping Center v. Robins, 447 U.S. 74, 83 n. 6, 100 S.Ct. 2035, 2041 n. 6, 64 L.Ed.2d 741 (1980) as follows:

> 'The term "property" as used in the Takings Clause includes the entire 'group of rights inhering in the citizen's [ownership].' It is not used in the 'vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead it] denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it....' [Citations omitted.]

Further, the restraint on alienation is of a peculiar sort in addition to its coming from government fiat rather than a grantor or transferor of property. In effect, it is a restraint potentially indefinite in duration, but subject to a sort of condition subsequent: when the hurricane comes and destroys the Esposito properties, the Plaintiffs will again be able to sell the land for its then de minimis market value as unimproved and unimprovable land, if anyone is interested in view lots. In the meantime they will have paid taxes, mortgage payments (where applicable), and regime fees (where applicable) based on the value the property had as improved property at the time of their purchase, all with the availability of resale.

The net effect of the foregoing is to convert the Esposito properties into sort

of terminable-at-will inalienable leasehold estates. When the Fates decide, as they certainly will eventually, to terminate the lease by destroying more than two-thirds of the structure thereon, the owners will presumably have to clear the rest of the property, continue to pay debt service on it, and be unable to sit in their no-longer extant livingrooms, which they can at least presently utilize as places to worry about their financial situations.[7] An analogy can be drawn to the "condemnation blight" cases, with

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[7] This is not said nor meant facetiously. The ability of outside conditions to destroy the peace, comfort, and repose sought in home ownership has long been recognized. For example, in Powell v. Taylor, 263 S.W.2d 906 (Ark. 1954), the Arkansas Supreme Court recognized the significance of this property interest - the expectation of peace, comfort and repose - in ruling that funeral homes in residential districts are nuisances per se, and hence enjoinable prior to construction.

which the Court is familiar, holding that it is a taking of property to "freeze" it by preventing development or sale by announcing condemnation, at least where the "freezing" is too lengthy. See, e.g., Urbanizadora Versalles, Inc. v. Rivera Rios, 701 F.2d 993 (1st Cir. 1983). In the instant case, of course, the "freeze" is indefinite in length.

Petitioners respectfully submit that the foregoing represents a clear taking under the interference with property rights aspect of the takings formula. The Esposito Petitioners have lost every aspect of their ownership of the property in question but the ability physically to occupy it on a temporary basis so long as no damage is done to it which is more severe than permitted by law, with con-

stant worry and concern.[8] From the "bundle of sticks" that is supposed to constitute our right to own property, these Plaintiffs have left about half of one stick. The Chavouses have no sticks at all. That is not enough.

LEGAL DISCUSSION

Introduction

It is important to establish at the outset that we are not discussing a prohibition of a use of land which is harmful

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[8] This worry is heightened by the stipulated fact that there is uncertainty as to whether such insurance as is presently on the property will be paid in the event of damage. Additionally, if there is this uncertainty, there is certainly no certainty that the insurance will be renewed or that new coverage will be capable of being purchased if the coverage is not renewed. In the event that insurance is not available or will not pay, mortgages and notes could be called. All this certainly interferes with the right of present enjoyment of the property.

to one's fellow citizens, but an ordinary use of land, permitted under applicable regulations and for which the land is zoned, which has been forbidden because the Legislature desired it in order to improve (as it saw it) the overall public condition by preserving beachfront appearances.

It is further respectfully submitted that the applicable analysis is not that under the Keystone case, infra, relied upon by the panel majority, and which has to do with preventing nuisance-like harm; it is instead the analysis of Nollan and First English.

Discussion

In 1987, this Court at last gave us bases from which to move in understanding the application of state and local regulation to private property. It decided Keystone Bituminous Coal Assn. v. DeBene-

dictis, 480 U.S. 470, 107 S.Ct. 1232 (1987); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 107 S.Ct. 2378 (1987), and Nollan v. California Coastal Commission, 438 U.S. 825, 107 S.Ct. 3141 (1987). In addition, the case of Hodel v. Irving, ___ U.S. ___, 107 S.Ct. 2076 (1987) adds somewhat to our understanding.

In Nollan, the property owners were told by the government either that they could not build - that they had to keep a small beach bungalow rather than replace it with a larger one - or that they had to give up their right to exclude the public from a small part of their property on the beachfront.

They won because there was no substantial state interest directly related to the construction of the larger home which was substantially advanced by the

easement condition.[9] The state maintained that its interest was to increase public access to public beaches. It claimed that the Nollans' larger home would interfere with "visual access" to the beach, which in turn would create a "psychological barrier" to "access." Finally, the Commission claimed that the Nollans' new house would in some manner increase the public's use of existing public beaches (even while it was creating

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[9] The formulation comes from several parts of the opinion. This Court also expressed its view in its increasingly favored "nexus" language:

> [T]he lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. (Nollan, 107 S.Ct. at 3148)

"barriers"), so as to create a need for more "access" in this way.

This was, the Court said, a case which did not meet "even the most untailored standards" (Nollan, 107 S.Ct. at 3148) of analysis. More to the point for present purposes, this Court gives us the more "tailored" standards it wishes us to apply in later cases.

It is important to note something that was not decided in Nollan: the Court explicitly did not determine whether the Commission's asserted governmental purposes, had they in fact been advanced by the means chosen, would have been sufficiently substantial governmental purposes, or whether imposing this requirement on the Nollans assuming the purposes to be sufficient would or would not violate the Takings Clause or the Equal Protection Clause. It wrote:

> The Commission argues that among these permissible purposes are protecting the public's ability to see the beach, assisting the public in overcoming the 'psychological barrier' to using the beach created by a developed shorefront, and preventing congestion on the public beaches. We assume, without deciding, that this is so -- in which case the Commission unquestionably would be able to deny the Nollans their permit outright if their new house (along, or by reason of the cumulative impact produced in conjunction with other construction)[fn] would substantially impede these purposes, unless the denial would interfere so drastically with the Nollans' use of their property as to constitute a taking.

(The footnote after "construction)" reads:)

> 4. If the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause. One of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear

> public burdens which, in all fairness and justice, should be borne by the public as a whole.' But that is not the basis of the Nollans' challenge here. (Nollan, 107 S.Ct. at 3147; emphasis supplied; citations omitted)

The gist of the foregoing is pretty simple: there are permissible regulations, of course. But the Court did not decide whether these particular regulations were permissible. The Court did not have to decide, since even if these were permissible methods the state's method of purporting to advance them bore no relationship to them. Using the principle of Occam's razor,[10] the Court focused upon the most obvious weak link in the state's position and dealt with it.

At the same time, though, the quoted passage seems to give us a pretty good idea that this Court would have analyzed

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[10] Roughly speaking, always look for the simplest explanation.

the rest of the case just as rigorously as it did the part needed for decision, had it had the occasion to do so. The instant case provides the occasion to do so.

In doing so, this Court can tell us whether, as it seems, we should use the analytical mode it set forth in Nollan: In evaluating whether a particular regulatory scheme effectuates a taking, we must look to see whether the regulation substantially advances a substantial, legitimate state interest (Nollan, 107 S.Ct. at 3146); further, since the issue is one of a protected right under the Bill of Rights (property regulation), the mere "rational relationship" analysis of certain due process and equal protection cases is explicitly rejected. (Nollan, 107 S.Ct. 4147, n.3) The Court specifically referred to the protection given First Amendment rights in the cited footnote; this

suggests that it is accepting the Carolene Products footnote approach to infringement upon the ownership of property,[11] mean-

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[11] See, United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938):

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

This Court has indicated that it meant this generally by its pronouncement regarding the dissent's proposal that planners, in effect, choose their words carefully after the decision in order to avoid its effect:

> We view the Fifth Amendment's property clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. As indicated earlier, our cases describe the condition for abridgement of property rights through the police power as a 'substantial advanc[ing]' of a legitimate State interest. We are inclined

ing that property rights, including the right to build upon and hence develop property, are due careful protection in the Courts.[12]

It is respectfully submitted that in the case at Bar, the panel majority over-

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> to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective. (Nollan, 107 S.Ct. at 3150; emphasis the Court's)

[12] The Court wrote, in discussing the notion that the government somehow conferred the ability of people to build on their land as a "benefit":

> But the right to build on one's own property -- even though its exercise can be subjected to legitimate permitting requirements -- cannot remotely be described as a 'governmental benefit.' (Nollan, 107 S.Ct. 3146, n.2; emphasis added)

looked the fundamental question whether any interest of the State (other than its desire to have parkland along the beaches, suitable for condemnation action but not regulation) is advanced by the regulation. The uncontradicted evidence is that erosion along the beachfront takes place no matter what is built along the beachfront; what is done by builders (note that this case does not have to do with projecting barricades into the ocean, or with seawalls - it has only to do with houses) has no proved effect upon erosion, which is a natural process of sand movement. There is no public harm specified in the findings of the statute or, perhaps more importantly, in the "Blue Ribbon" report which underlies the findings. It is asserted in the panel majority opinion (p. 8 of the slip opinion) that State was acting to protect the public interest in health,

the environment, and the fiscal integrity of the area. There is no citation for this assertion for the good reason that none exists. The regulation should have been found invalid at this initial point. Further, there is no determination of how the (nonexistent) asserted interest is advanced by the regulation. Plaintiffs' expert's evidence was that there was no relation between the regulation and any legitimate State interest other than the interest the State might have in keeping tourists from seeing houses fairly close to the beachfront (again, this interest is fine for condemnation, not for regulation).

However, assuming the existence of some interest ("substantial" and "legitimate") advanced somehow by the regulation, the panel majority accepted that the next aspect of the analysis is to examine the

effect of the regulation and determine what it has done to the property owner. As this Court has pointed out on numerous occasions, a regulation not involving physical appropriation of property which denies an owner economically viable use of his land (Agins v. Tiburon, 447 U.S. 255, 260, 100 S.Ct. 2138;, 2141, 65 L.Ed. 2d 106 (1980)), or defeats the owner's legitimate investment-backed expectations (Penn Central Transportation Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1979) will be a taking, even if it substantially advances a substantial, legitimate governmental interest. "[The fifth amendment] is designed not to limit governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." (First English, 107 S.Ct. at 2386.

See, L. Tribe, AMERICAN CONSTITUTIONAL LAW 591 n.12 (2d Ed. 1988).[13] Thus, a taking can be effected by a regulation which is rightly directed toward a legitimate police power goal (i.e., the protection of the public health, safety, or general welfare), if private property is taken in the process. A regulatory taking, in short, occurs either if the regulation is invalid (the Nollan formulation) or if it deprives the property owner of economically viable use or defeats legitimate in-

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[13] This general approach is articulated or applied, or both, in at least the following Supreme Court cases: Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984); United States v. Security Industrial Bank, 459 U.S. 70 (1982); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Dames & Moore v. Regan, 453 U.S. 654 (1981); Kaiser Aetna v. United States, 444 U.S. 164 (1979); Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974).

vestment-backed expectations.[14] Plain-

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[14] See, e.g., Agins v. City of Tiburon, 447 U.S. 255, 260 (1980); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985); Keystone Bituminous Coal Ass. v. DeBenedictis, 107 S.Ct. 1278 (1987). In GEORGIA OUTDOOR ADVERTISING, INC., d/b/a Allison Outdoor Advertising, Inc., a Georgia Corporation v. The CITY OF WAYNESVILLE, 900 F.2d 783 (4th Cir. 1990) the Fourth Circuit reviewed the Keystone Bituminous formulation, thus:

> land use regulation can effect a taking if it '"does not substantially advance legitimate state interests ... or denies an owner economically viable use of his land."' As was the case in Durham, we already have concluded that the ordinance here in issue advances a legitimate state interest, see Waynesville I, 833 F.2d at 46, and therefore the crucial inquiry centers on the second prong of the test: whether the ordinance denies Georgia Outdoor Advertising economically viable use of its property. Relying on Keystone and Penn Central Transportation Co. v. New York, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), Durham properly framed the analysis under the second prong of Keystone. First, one must designate 'the appropriate unit of ... property affected by the ordinance.' Durham, 844

tiffs did not contend merely that there had been a drastic diminution in the value of their property, contrary to the assertion in the panel majority opinion (Slip Opinion at p. 9); rather, they contend that all economic use of their property has been taken from them, as is explained above.

Thus, this case, particularly taken together with the Lucas case, offers this Court an excellent opportunity to resolve ambiguity in the lower courts' understand-

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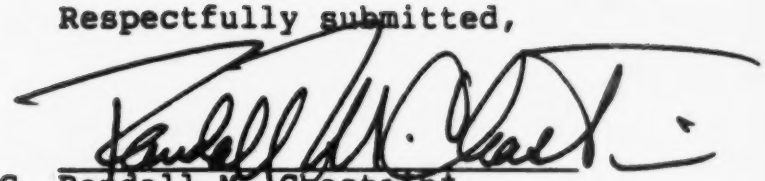
> F.2d at 176. Second, one must determine whether the ordinance denies [plaintiff] economically viable use of the appropriate unit of its property by considering the following factors identified in Penn Central: (1) The 'economic impact of the regulation on the claimant,' (2) the 'extent to which the regulation has interfered with distinct investment-backed expectations,' (3) the 'character of the governmental action.' 844 F.2d at 176. (900 F.2d at 787)

ing of Keystone and Nollan, and further the emerging jurisprudence of the Fifth Amendment's Takings and Due Process clauses.

CONCLUSION

For the reasons stated above, this Petition for a Writ of Certiorari should be granted, and the Court should allow Petitioners to show more comprehensively that the Fourth Circuit misapplied Nollan, Keystone, and other takings cases. If the Fourth Circuit's opinion stands unreviewed, it will stand for the proposition that a State's assertion that it has a legitimate interest in a particular land use regulation suffices to make the regulation sufficient. Given the burden this regulation places on landowners, the Fourth Circuit's approach to takings in this case would essentially vitiate the Fifth Amendment as a restraint on regulation, unless a direct physical invasion took place. This should not be permitted.

Respectfully submitted,



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APPENDIX

Item 1
939 F.2d 165

John V. ESPOSITO, et al., Plaintiff-Appellant,

v. The SOUTH CAROLINA COASTAL COUNCIL, a South Carolina governmental agency; John C. Hayes, III, Chairman of the South Carolina Coastal Council; H. Wayne Beam, Executive Director of the South Carolina Coastal Council, Defendants-Appellees. Natural Resources Defense Council; South Carolina Coastal Conservation League,
Amici Curiae.

Barney L. CHAVOUS; Odessa K. Chavous, Plaintiffs-Appellees,

v. The SOUTH CAROLINA COASTAL COUNCIL, a South Carolina governmental agency,
Defendant-Appellant, and John C. Hayes, III, Chairman of the South Carolina Coastal Council; H. Wayne Beam, Executive Director of the South Carolina Coastal Council, Defendants. Natural Resources Defense Council; South Carolina Coastal Conservation League,

Amici Curiae.

Nos. 89-1840, 90-2367.
United States Court of Appeals,
Fourth Circuit.

Argued July 18, 1990.
Decided July 3, 1991.

Before RUSSELL, WIDENER and HALL, Circuit Judges.

WIDENER, Circuit Judge:

These consolidated cases deal with challenges to the judgments of the district court concerning claims that the defendants violated the fifth and fourteenth amendments of the United States Constitution. The district court in Esposito, No. 89-1140, rejected the plaintiffs' claim that South Carolina's Beachfront Management Act (Act) violated the due process and takings clauses of the fifth and fourteenth amendments. In Chavous, however, No. 90-2367, the district court entered judgment for the plaintiffs on their claim that the Act violated the takings clause and enjoined its enforcement. 745 F.Supp. 1168 (1990). We affirm the district court's judgment in Esposito, and vacate on account of

mootness its judgment in Chavous.

I. In 1988, the General Assembly of South Carolina enacted the Beachfront Management Act, which amended certain sections of Title 48, Chapter 39 of the Code of Laws of South Carolina. This legislation recited the Assembly's finding that "[m]any miles of South Carolina's beaches have been identified as critically eroding." 1988 Act No. 634, s 1. The Assembly noted that the beach/dune system along the coast served as a storm barrier protecting lives and property, generated a substantial portion of the State's tourism revenues, provided a habitat for species of plants and animals, and offered a natural, healthy environment enhancing the well-being of the State's citizens. 1988 Act No. 634, s 1(a)-(d). The legislation further stated that the beach/dune system had been threatened by the pres-

ence of unwise development "too close" to the beaches and by the use of certain hard erosion control devices that had actually increased the vulnerability of beachfront property to damage. 1988 Act No. 634, s 1. The Assembly accordingly approved a "comprehensive, long- range beach management plan" entailing "a gradual retreat from the system over a forty-year period." 1988 Act No. 634, s 2. Among the numerous specific provisions enacted to effectuate this plan, we need discuss only those implicated by the present actions. The plaintiffs' claims arose through the operation of the statutory requirement that the defendant, South Carolina Coastal Council, establish certain lines in each county fronting the Atlantic Ocean. S.C.Code Ann. s 48-39-280(D) (Supp.1989). The first of these lines was the "baseline." As ap-

plied to the property involved in these actions, the Act required that this line be drawn at "the location of the crest of an ideal primary oceanfront sand dune" or, in areas where the shoreline had been altered by the construction of erosion control or other manmade devices, "where the crest of an ideal primary oceanfront sand dune ... would be located if the shoreline had not been altered." S.C.Code Ann. s 48-39-280(A)(1) (Supp.1989). The Act next directed that a "setback line" be calculated. In order to implement the statute's stated policy of retreat, this line was established "landward of the baseline ... at a distance which is forty times the average annual erosion rate," but "no less than twenty feet from the baseline." S.C.Code Ann. s 48-39-280(B)(1) (Supp.1989). The Assembly provided that these requirements be

implemented by "utilizing the best available information and data" and set out specific procedures to be followed by the South Carolina Coastal Council in establishing the various lines. S.C.Code Ann. s 48-39-280(A) (Supp.1989). The plaintiffs in both Esposito and Chavous are owners of real property located in the Town of Hilton Head, Beaufort County, South Carolina. The lots of the Esposito plaintiffs have been improved with residential dwellings. In terms of the provisions of the Act, most of these dwellings were situated at least partially seaward of the baseline or within what the plaintiffs call the "dead zone," an area extending twenty feet landward of the baseline. The Act stated that any habitable structure "destroyed beyond repair" by natural causes or fire could not be rebuilt seaward of the baseline or within

the dead zone. S.C.Code Ann. s 48-39-290(B) (Supp.1989). [FN1] An administrative interpretation defined "destroyed beyond repair" to mean that "more than two thirds (66 2/3 %) of the building components making up the structure are damaged to such a degree that replacement is required in order for the structure to be habitable, functional or sound." The Act also regulated attempts to make additions to existing structures and install recreational amenities. S.C.Code Ann. *168 s 48-39-290(B) (Supp.1989). The plaintiffs claimed that by virtue of these restrictions, especially the prohibition on the reconstruction of their dwellings in the case of destruction beyond repair, South Carolina had unlawfully taken their private property without just compensation and violated the due process clause.

FN1. We note that there appears to be a conflict between certain provisions of s 48-39-290 (Supp.1989). Section (B) initially states that habitable structures destroyed beyond repair may be reconstructed "seaward of the setback line," provided that certain requirements are met. The statute later states, however, after section (B)(8), that "[n]othing in this section allows any rebuilding in the area from the baseline to twenty feet landward of the baseline." While the parties appear to agree that the latter provision controls, we express no opinion concerning which provision should be construed to govern activity in the area extending twenty feet to landward from the baseline. Rather, we will apply the more restrictive interpretation for purposes of reviewing the

plaintiffs' claim that the statutory restrictions rise to the level of a taking.

The Chavous plaintiffs, on the other hand, own a vacant lot with no improvements. Under the statutory scheme, approximately ninety percent of their lot was situated seaward of the baseline or within the dead zone. The Act stated that no part of a new habitable structure could be constructed seaward of the baseline or in the dead zone. S.C.Code Ann. s 48-39-300 (Supp.1989). The plaintiffs claimed that this prohibition of construction amounted to an unlawful taking of their private property without compensation and a violation of due process.

Before considering the substance of these claims, we should take into account the effect of recent amendments to the Act upon our review. [FN2] The plaintiffs' claims and the district court's judgments

involved, of course, only the effects of the provisions of the 1988 version of the statute. The enactment of the 1990 Act during the pendency of this appeal, with its provisions for special permits and other changes that may affect the plaintiffs, does not relieve us of the need to address the plaintiffs' claims under the provisions of the 1988 Act. Even if the amended Act cured all of the plaintiffs' concerns, the amendments would not foreclose the possibility that a taking had occurred during the years when the 1988 Act was in effect. See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 911 F.2d 1331, 1335 (9th Cir.1990). As the Supreme Court has recognized, "the government may elect to abandon its intrusion or discontinue regulations," but "no subsequent action by the government can relieve it of the

duty to provide compensation for the period during which the taking was effective." First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 317, 321, 107 S.Ct. 2378, 2389, 96 L.Ed.2d 250 (1987). We therefore must consider whether the 1988 Act effected a taking or due process violation during the period that it was in effect. [FN3]

FN2. In 1990, the General Assembly returned to the Act and made several significant changes in the statutory scheme discussed above. The 1990 Act eliminated the dead zone so that activity in the area twenty feet landward of the baseline is now governed by the less restrictive regulations that apply to the rest of the area between the baseline and the setback line. S.C.Code Ann. s 48-39-290(B) (Supp.1990). In addition, a definition of "[d]estroyed beyond repair"

as meaning "more than sixty-six and two-thirds percent of the replacement value of the habitable structure ... has been destroyed" was codified. S.C.Code Ann. s 48-39-270(11) (Supp.1990). Furthermore, the amendments gave the South Carolina Coastal Council authority to issue special permits allowing construction or reconstruction of habitable structures under certain conditions, even if such structures are located seaward of the baseline. S.C.Code Ann s 48-39-290(D) (Supp.1990).

FN3. The plaintiffs in both Esposito and Chavous appear to urge us to consider also their takings and due process claims under the provisions of the 1990 Act. Because these amendments were enacted subsequent to the district court's judgments, there has been no decision by that court upon the question of whether the revised statutory scheme

amounts to a taking or violation of due process. These questions, therefore, are not properly before us and we express no opinion upon them.

II. The fifth amendment, which provides in relevant part that "private property [shall not] be taken for public use without just compensation," applies to the States through the fourteenth amendment. See Chicago Burlington and Quincy R.R. Co. v. Chicago, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897). As an initial matter, we note that the courts have traditionally upheld the validity of setback lines and similar land use regulations against constitutional challenges. E.g. Gorieb v. Fox, 274 U.S. 603, 47 S.Ct. 675, 71 L.Ed. 1228 (1927); Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); Welch v. Swasey, 214

U.S. 91, 29 S.Ct. 567, 53 L.Ed. 923 (1909). The plaintiffs argue, however, that the present case is distinguishable from these prior decisions and we therefore review their claims in light of the more recent Supreme Court takings clause cases. In Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470, 485, 107 S.Ct. 1232, 1241, 94 L.Ed.2d 472 (1987) (quoting Agins v. Tiburon, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980)), the Court stated that a land use regulation may constitute a taking if it "does not substantially advance legitimate state interests, ... or denies an owner economically viable use of his land." The district court in Esposito addressed the first prong of that takings test by holding that the State had "an important interest" in protecting its beaches and that the challenged statutes

were "substantially related" to furthering this goal. The Esposito plaintiffs attack this conclusion, contending that the Act was neither based on a legitimate State interest nor substantially related to any proper State goal. While the Court may not have elaborated on the standards for determining what constitutes a "legitimate state interest" or what relation between a regulation and the State's interest meets the requirement that one "substantially advance" the other, it has indicated that "a broad range of governmental purposes and regulations" will satisfy these requirements. Nollan v. California Coastal Comm'n, 483 U.S. 825, 834-35, 107 S.Ct. 3141, 3147-48, 97 L.Ed.2d 677 (1987). We are in agreement with the district court that the Assembly's stated purpose to "protect, preserve, restore, and enhance the beach/dune sys-

tem" constituted a legitimate State interest and exercise of the police power of the State. South Carolina's beach/dune system is a valuable resource that not only protects life and property from the dangers of the ocean, but also provides a source of recreation and tourism-related revenue. The State's interest here was of the same nature as that approved in Keystone, 480 U.S. at 488, 107 S.Ct. at 1243, where the Court found that Pennsylvania had acted "to protect the public interest in health, the environment, and the fiscal integrity of the area." [FN4]

FN4. In Lucas v. South Carolina Coastal Council, --- S.C. ----, 404 S.E.2d 895 (1991), the South Carolina Supreme Court, on a fact situation akin to that of the Chavous plaintiffs, held there was no taking of a beachfront plaintiff's property by the enforcement and

application of the 1988 Beachfront Management Act involved here. The Court stated, among other things, that it followed the majority opinion in Keystone.

We further believe that the means chosen by the legislature bore a substantial relation to its goal of protecting this valuable resource. While the Esposito plaintiffs urge us to hold that the Assembly's policy of withdrawal of building seaward of the setback line is not a viable response to the situation of beachfront erosion, we view the matter as one in which "[s]tate legislatures ..., who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character and degree of regulation which these new and perplexing conditions require." Gorieb v. Fox, 274 U.S. at 608, 47 S.Ct.

at 677. The record in this case indicates that the decision to adopt a strategy of gradually withdrawing unwise development from the beach/dune system was a logical and sufficiently well- founded approach to dealing with beachfront erosion by attempting to restore the natural equilibrium between sand supply, wind, and waves. Having found that the "essential nexus," Nollan, 483 U.S. at 837, 107 S.Ct. at 3148, between the State's interest and its chosen means is present in this case, we will not second-guess the Assembly's decision. The second prong of the takings analysis requires an inquiry into whether the Act denied the Esposito plaintiffs the economically viable use of their property. In Penn Central Transportation Company v. New York, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978), the Court identified several

factors as particularly significant in this inquiry: The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations.... *170 So too, is the character of the governmental action. See Georgia Outdoor Advertising v. City of Waynesville, 900 F.2d 783, 787 (4th Cir.1990); Naegele Outdoor Advertising, Inc. v. City of Durham, 844 F.2d 172, 176 (4th Cir.1988). The Esposito plaintiffs do not contend that the character of the governmental action in this case is the type of physical invasion or appropriation for public use that readily leads to a finding that a taking has occurred. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426, 102 S.Ct. 3164, 3170, 73 L.Ed.2d 868

(1982). Rather, they argue that the enactment of the Act drastically diminished the value of their property. [FN5] They contend that because their property had significantly less economic market value after passage of the Act, they were effectively deprived of their rights and expectations of being able to sell and borrow money against their property.

FN5. The district court correctly drew attention to the "distinction between a claim that the mere enactment of a statute constitutes a taking and a claim that the particular impact of government action on a specific piece of property requires the payment of just compensation." Keystone, 480 U.S. at 494, 107 S.Ct. at 1246; see Beacon Hill Farm Assocs. v. Loudoun County Supervisors, 875 F.2d 1081 (4th Cir.1989). In the present action, it appears that

the rebuilding provision of which the plaintiffs complain has not actually been applied to any piece of property. None of the Esposito plaintiffs had their homes destroyed beyond repair or were denied permission to rebuild by operation of the statute. Rather, their alleged injuries rest, like those of the plaintiff in Euclid Ambler Realty Co., 272 U.S. at 395, 47 S.Ct. at 121, "upon the broad ground that the mere existence and threatened enforcement of the [statute], by materially and adversely affecting values and curtailing the opportunities of the market, constitute a present and irreparable injury." In order to succeed on their claim, therefore, the plaintiffs must face the admittedly "uphill battle" of proving that the mere enactment of the Beachfront Management Act so denied

them the economically viable use of their property as to constitute a taking. Keystone, 480 U.S. at 495, 107 S.Ct. at 1247.

In response to these contentions, we note that the courts have traditionally looked to the existing use of property as a basis for determining the extent of interference with the owner's "primary expectation concerning the use of the parcel." Penn Central, 438 U.S. at 136, 98 S.Ct. at 2665. We find that the Act permitted the Esposito plaintiffs to continue their existing use of their property and dwellings in the same manner that they could have used the property prior to its enactment. The plaintiffs, in fact, have stipulated that "[n]one of the Plaintiffs in the Esposito case have discontinued use of their property, as it was used before enactment of the subject

Statutes...." They continued to retain the fundamental incidents of ownership, including the right to possess the property, exclude others from it, alienate the property and continue to use it for residential and recreational purposes; and they were significantly diminished only in their discretion to rebuild a structure in the speculative event of its virtually complete destruction. Although we are cognizant of the plaintiffs' claim that passage of the Act affected the value of the property and its potential attractiveness on the market, the Supreme Court has observed that neither diminution in property value, Penn Central, 438 U.S. at 131, 98 S.Ct. at 2662, nor "even substantial reduction of the attractiveness of the property to potential purchasers," Kirby Forest Indus. v. United States, 467 U.S. 1, 15, 104 S.Ct. 2187, 2196, 81 L.Ed-

.2d 1 (1984), will suffice to establish that a taking has occurred. In light of the plaintiffs' continued use of the property precisely as they used it prior to the passage of the Act, we are of opinion that the Esposito plaintiffs have not established that the regulation in question was "so onerous that it [had] the same effect as an appropriation of the property through eminent domain or physical possession." Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 199 (esp. n. 17, at 199), 105 S.Ct. 3108, 3123, 87 L.Ed.2d 126 (1985). We also reject the Esposito plaintiffs' due process claim. For the statute in question to be held in violation of the fourteenth amendment, it must be found "clearly arbitrary and unreasonable, having no substantial relationship to the public health, safety, morals or general wel-

fare." Beacon Hill Farm Assocs. v. Loudoun County Supervisors, *171 875 F.2d 1081, 1085 n. 5 (4th Cir.1989) (quoting Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395, 47 S.Ct. 114, 121, 71 L.Ed. 303 (1926)). For the reasons discussed previously, we hold that the 1988 Act was substantially related to South Carolina's legitimate interest in protecting its beaches and therefore reject the plaintiffs' due process claim.

We next turn to the judgment of the district court in Chavous. In considering the plaintiffs' takings claim, [FN6] the district court concluded that the regulations contained in the Act did indeed bear a substantial relation to a legitimate State interest. On the second prong of the test, however, the district court decided that the Act had denied the Chavous plaintiffs the economically viable

use of their property. The court enjoined further enforcement of the Act against the plaintiffs.

FN6. The Chavous plaintiffs also advanced a due process claim, but the district court declined to rule upon it after concluding that the plaintiffs were entitled to relief on their takings claim.

The defendants urge us to reverse the judgment of the district court and hold that the Act did not work a taking of the plaintiffs' property. The plaintiffs, on the other hand, ask that we affirm the judgment with its injunction prohibiting enforcement of the Act against them. We decline to take either course. The injunctive remedy granted by the district court has become pointless because the

enjoined statute has been superseded by a significantly amended statutory scheme and is no longer in effect. See Tahoe Sierra Preservation Council, 911 F.2d at 1335-36. The district court, moreover, held that the remedy of damages was barred by the eleventh amendment and the plaintiffs have not challenged this ruling on appeal. We have no jurisdiction over a claim on which no effective relief can be granted. Mills v. Green, 159 U.S. 651, 653, 16 S.Ct. 132, 133, 40 L.Ed. 293 (1895). In remarkably similar context, we have only recently held that a changed zoning regulation rendered moot the contest of a prior regulation. 11126 Baltimore Blvd. v. Prince Georges County, 924 F.2d 557 (4th Cir.1991). In view of the mootness of the plaintiffs' claim for relief, we express no opinion concerning the correctness of the district court's

determination that the 1988 Act effected a taking of the Chavous property.

III.

For the reasons discussed above, we affirm the district court's judgment in Esposito. In Chavous, we vacate the judgment of the district court and remand to the district court with instructions that the case be dismissed as moot. See United States v. Munsingwear, Inc., 340 U.S. 36, 39, 71 S.Ct. 104, 106, 95 L.Ed. 36 (1950).

Accordingly, the district court's judgment in 89-1840 is AFFIRMED and the district court's judgment in 90-2367 is VACATED AND REMANDED WITH INSTRUCTIONS.

K.K. HALL, Circuit Judge, dissenting:

Let me say, first, that I thoroughly agree with the purposes of the Beachfront

Management Act, and second, that my agreement or disagreement with and the wisdom or folly of the Act ought not bear upon whether just compensation should be paid for its effectuation. The Just Compensation Clause is not a miniature variant of substantive due process, ready to slap the government with monetary liability where we believe a regulation is foolish yet not so utterly silly that we should strike it down in its entirety. I hope and expect that the legislative and executive branches will be wise, and that the "public use" for which they take, damage, destroy or diminish private property will be admirable. Nonetheless, the Just Compensation Clause does not apply only to poor governmental choices.

I.

Before going on to our disagreements, I concur in the majority's judgment that

the substantive due process claim of the Esposito plaintiffs was properly rejected by the *172 district court. I cannot find fault in either the legislative end or means.

II.

It is all too easy in a takings case to become enmeshed in the various tests, factors, and doctrines the Supreme Court has applied through the years. Penn Central Transportation Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) (three-factor test); Agins v. Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980) (two-part test); Hodel v. Indiana, 452 U.S. 314, 101 S.Ct. 2376, 69 L.Ed.2d 40 (1981) (second Agins test only--"no economically viable use"); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) (per se

rule for "permanent physical occupations"). The Court itself has admitted that its inquiry is essentially ad hoc. Penn Central, 438 U.S. at 124, 98 S.Ct. at 2659. The Court's "tests" are not rigid, unforgiving yardsticks to be slavishly applied notwithstanding a draconian result. On the contrary, the tests are guidelines for resolving the question at the bottom of every case: whether the claimant has been "forc[ed] ... alone to bear [a] public burden[ ] which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960). [FN1] Who should pay for South Carolina's sudden change in land-use policy? I believe that fairness and justice require the expense to be borne by the public.

FN1. Armstrong's admonition lacks the intellectually calming appearance of predictability of a two- or three-factor "test." A legal standard no better defined than "fairness" leaves any judge ill at ease. Nonetheless, one recent commentator, after an exhaustive inventory and analysis of the Supreme Court's takings cases, concluded that the "moral justification" for placing a public burden on a single individual is the real issue on which any given case turns. Peterson, The Takings Clause: In Search of Underlying Principles, 77 Calif.L.Rev. 1299 (1989) (Part I) and 78 Calif.L.Rev. 53 (1990) (Part II).

We are confronted with the claims of particular persons resulting from the Act's devastating effect on the value of particular property. The plaintiffs do

not attack the facial validity of the Act; they challenge it as applied to them. Hence, they need not make the strict showing required by the "no economically viable use" test. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495, 107 S.Ct. 1232, 1247, 94 L.Ed.2d 472 (1987). The Keystone claimants failed to show how the challenged act affected any particular property; the Esposito defendants have done so. This case is not a facial challenge, and the "no economically viable use" test should not apply to it. I disagree, therefore, with footnote 5 of the majority opinion. The factors the Supreme Court most often uses in "as applied" takings cases were identified in Penn Central, 438 U.S. at 124, 98 S.Ct. at 2659. They are (i) the character of the governmental action, (ii) the extent of interference with reasonable investment-

backed expectations, and (iii) the economic impact on the claimant. Application of these factors illustrates that "fairness and justice" require compensation in these cases. The first prong of the Penn Central test--character of the governmental action--alludes to two potentially dispositive situations. If the government has committed or authorized a permanent physical invasion of private property, compensation is always required. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). If the government acts to prohibit a "noxious use" of property, compensation is almost never required. Mugler v. Kansas, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887). South Carolina is not occupying the claimants' lots, and I reject the notion that a beachfront bungalow is a "noxious use" of property. See infra

note 2. The character of the governmental action does not, therefore, resolve this case. The second and third of the Penn Central factors weigh heavily in the landowners' favor. Before the 1988 amendments to the Act, the Esposito claimants' lots and homes ranged in value from $205,000 to $450,000. The lame duck nature of their use of the property has caused a substantial diminution in value--35% in the opinion of the Beaufort County assessor. Most of the affected properties are mortgaged. Landowners who had equity that could serve as collateral for other loans have seen their nest egg disappear. Several lending institutions entirely refused to accept the doomed properties as security, notwithstanding that they still have some value. Prospective buyers have been equally hesitant. No affected properties have been sold

since the Act amendments, though several have been on the market. The "investment-backed expectations" of these landowners have been bludgeoned. Were these expectations "reasonable?" Lending institutions thought so. The county thought so, and assessed property taxes accordingly. The state allowed 49% of its coastline to become developed without interfering. Indeed, the state's coffers benefitted from the tax and tourism revenue generated by development of its beaches. I believe that a person could have purchased one of the affected properties with the reasonable expectation that his investment would not be affected by a drastic change in long-term land use policies.

Even under the majority's harsh application of the "no economically viable use" test, the Act would have clearly effected

a compensable taking of the Chavous landowners' lots. The majority is able to avoid the issue [FN2] by a combination of two fortuities--subsequent amendments to the Act and the district court's unappealed holding that the Eleventh Amendment bars an award of just compensation against a state in a federal court. [FN3] I agree with the majority that a remand is necessary. However, I would not create a sweeping rule that a state whose statute has been enjoined may moot the injunction by tinkering with the statute. The recent amendments to the Act may or may not rectify its previous constitutional defects. At oral argument, the landowners made it clear that they still challenge the constitutionality of the Act, even as amended; there is plainly still a case or controversy, and I would not force the landowners to file a new suit.

I would remand to permit the Coastal Council to move to dissolve the injunction.

FN2. The South Carolina Supreme Court addressed a Chavous-style case in Lucas v. South Carolina Coastal Council, 404 S.E.2d 895 (S.C.1991). The state court, by a 3-2 margin, upheld the Act under the narrow "noxious use" exception to compensability. I agree entirely with the dissenters in Lucas. A noxious use is one that is "tantamount to a public nuisance." Keystone, 480 U.S. at 491, 107 S.Ct. at 1245. Living in a beach bungalow bears little resemblance to the noxious uses of property the Supreme Court has identified. Mugler v. Kansas, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887) (distillery); Reinman v. Little Rock, 237 U.S. 171, 35 S.Ct.

511, 59 L.Ed. 900 (1915) (downtown livery stable); Hadacheck v. Sebastian, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915) (urban brickyard); Miller v. Schoene, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928) (red cedar trees infected with apple rust disease near commercial orchards); and Goldblatt v. Hempstead, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962) (quarrying below water table near town that depended on groundwater supply). The rapidity with which rental beach houses are gobbled up by the public causes me to doubt that they are, at least yet, generally regarded as "tantamount to a public nuisance." Finally, the Act's gradual forty-year retreat scheme, rather than immediate destruction of all offending structures, is clear proof that the Esposito claimants' residences are not

dire threats to public safety and welfare. A "public nuisance" ought to be abated, not phased out through a half-lifetime of attrition.

FN3. I agree that this latter holding is not before the court, but I have strong doubts that it was correct. As the majority notes, the Fifth Amendment's Just Compensation Clause was one of the earliest guarantees of the Bill of Rights to be enforced against the states through the Fourteenth Amendment. Chicago Burlington & Quincy R. R. Co. v. Chicago, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897). Inasmuch as the Supreme Court has now held that the Just Compensation Clause always requires compensation for any taking, notwithstanding subsequent repeal or invalidation of the offending regula-

tion, First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304, 317, 107 S.Ct. 2378, 2387, 96 L.Ed.2d 250 (1987), the Eleventh Amendment's general bar of damages against states must yield. Otherwise, a recalcitrant state could nullify the Just Compensation Clause by simply refusing to furnish a procedure to assess and award compensation. The Clause could be converted from a fundamental constitutional right into an empty admonition.

III. Legislatures and administrators undoubtedly often face the choice between purchasing a property right or regulating it away. In these days of deficits, it must be tempting to choose the costless regulatory route. Perhaps the Framers would have ensured more efficient govern-

ment by permitting thievery of private property for public uses. However, they sacrificed the expedience of this approach in favor of a system that requires a proposed public use be one for which the public is willing to foot the bill. As Justice Holmes put it,

> a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the damage.

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922).

South Carolina now admits that its long-standing land use policies were ill- advised. Good government occasionally requires such admissions; history is a lesson, not a straightjacket. However, a governmental error is a collective error,

and the burden of rectifying it should be borne by all, not just by those who unfortunately, but reasonably, relied on it. Except as stated elsewhere in this opinion, I respectfully dissent.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

JOHN V. ESPOSITO, et al.,

versus

SOUTH CAROLINA COASTAL COUNCIL

BARNEY L. CHAVOUS, et al.,

versus

SOUTH CAROLINA COASTAL COUNCIL

ORDER

Upon a request for a poll of the court on the petition for rehearing en banc, Judge fHall voted to rehear the cases by the en banc court, and Judges

Ervin, russell, Widener, Phillips, Murnaghan, Sprouse, Wilkinson, Wilkins, Niemeyer and Hamilton to deny rehearing en banc.

It is accordingly Adjudged and Ordered that the petition for rehearing en banc shall be, and the same hereby is, denied.

The panel considered the peitition for rehearing and is of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and the same hereby is, denied.

Judge Russell and Judge Widener concur in this order. Judge Hall dissents; he would grant rehearing for the reasons expressed in his dissenting opinion.

Filed: September 6, 1991

Item 2

(Cite as: 745 F.Supp. 1168)

Barney L. CHAVOUS and Odessa K. Chavous, Plaintiffs,

v.

The SOUTH CAROLINA COASTAL COUNCIL, a South Carolina government agency, and John C. Hayes, III, Chairman of the South Carolina Coastal Council, and H. Wayne Beam, Executive Director of the South Carolina Coastal Council,

Defendants.

Civ. A. No. D:89-0216-1.

United States District Court,

D. South Carolina,

Beaufort Division.

March 27, 1990.

ORDER

HAWKINS, Chief Judge.

This is an action charging the defendants with violations of the due process and just compensation provisions of the

fifth amendment to the United States Constitution. On October 13, 1989, this court filed an order directing the Clerk of Court to enter judgment in the plaintiffs' favor on the takings claim. Also, in that order consideration of the proper remedy was postponed pending the completion of supplemental proceedings on that issue. The parties appeared before this court, sitting without a jury, on January 23, 1990, for oral argument on the damages issue. At the conclusion of that hearing, the parties were granted a brief period of time in which to file any additional information. Having considered the oral presentations and the proposed findings of fact and conclusions of law submitted by the parties, the court makes the following Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Proce-

dure.

FINDINGS OF FACT 1. The plaintiffs, Barney and Odessa Chavous, own a parcel of real property at North Forest Beach on Hilton Head Island, South Carolina, which fronts upon and is adjacent to the Atlantic Ocean.

2. When the plaintiffs purchased the subject property in July, 1984, it was an unimproved parcel with a fair market value of One Hundred Ten Thousand dollars ($110,000.00). Nonetheless, all utility services are accessible from the parcel and it is zoned for residential use. The plaintiffs purchased the property for the purpose of building a residential dwelling that they could use and that could be leased out to others visiting Hilton Head Island. In preparation for construction of such a dwelling, the plaintiffs obtained a construction permit from the

City of Hilton Head Island, and expended approximately Ten Thousand dollars ($10,000.00) for architect fees, drawings, and related costs.

3. On June 2, 1988, the South Carolina General Assembly approved certain amendments (hereafter referred to as The Beachfront Management Act) to the South Carolina Coastal Zone Act of 1977 [FN1] which, inter alia, placed limitations on the use of real property adjacent to the Atlantic Ocean. [FN2] The bill containing those amendments was signed by the Governor on June 7, 1988, and it became effective as of July 1, 1988. As a result of the enactment of this legislation, the plaintiffs were prohibited from improving their property with a structure. The plaintiffs then instituted the instant action, and, in an order dated October 13, 1989, the court concluded that the

aforementioned prohibition amounts to a taking of property without just compensation.

FN1. The Coastal Zone Act of 1977 is codified in Title 48, Chapter 39 of the Code of Laws of South Carolina.

FN2. The Beachfront Management Act is codified beginning at S.C.Code Ann. s 48-39-270 (Law. Co-op. Pub. Co. Supp.1989), and the relevant provisions are discussed fully in this court's order dated October 13, 1989).

4. Immediately prior to the enactment of the Beachfront Management Act the plaintiffs' property had a fair market value of one hundred fifty thousand dollars ($150,000.00). Based upon the affidavit of Steven V. Linsday, the court concludes that the value of properties not subject to the restrictions contained in the Beachfront Management Act appreciated

twenty to twenty-five percent (20%-25%) during the period from June 30, 1988, to January 31, 1990. Moreover, the court concludes that due to the Beachfront Management Act provisions the value of the plaintiffs' property did not increase during the same period.

5. In his affidavit Mr. Linsday also attests that the passage of the Beachfront Management Act has deprived the plaintiffs of net rental income in the amount of one thousand three hundred eighty-four and 00/100 dollars ($1,384.00) per month. While this calculation contains deductions from the gross rental proceeds for real estate taxes, insurance, and maintenance, it omits an important item of overhead. As mentioned above, the parcel is presently unimproved and could not be used for residential purposes until a residence of some type is constructed on the property.

The monthly cost of such a dwelling would be a significant deduction from gross rental proceeds that would likely exceed all other costs combined. Accordingly, this item of damage is too speculative to warrant serious consideration. 6. During the period from July 1, 1988, through January 31, 1990, the plaintiffs paid a total of nine thousand eight hundred dollars ($9,800.00) in mortgage interest with respect to the subject property. Additionally, for that same period, the plaintiffs have paid real estate taxes in the total amount of two thousand five hundred dollars ($2,500.00). 7. Finally, the court finds as a fact that the plaintiffs have been denied the use of One Hundred Fifty Thousand dollars ($150,000.00) for the period from July 1, 1988, through January 31, 1990. Using the statutory interest rate of eight and

three-quarters percent (8 3/4 %), the amount of that loss is equal to twenty thousand seven hundred eighty-one dollars ($20,781.00) for the relevant period.

CONCLUSIONS OF LAW

1. This court has jurisdiction over the parties to this action. 2. This court has jurisdiction over the subject matter of this dispute pursuant to 28 U.S.C. s 1331 and the doctrine of pendant claim jurisdiction. 3. The defendants' invocation of the eleventh amendment to the United States Constitution will be considered first because discussion of that issue may obviate the need to consider the plaintiffs' claim for pecuniary relief. [FN3] The eleventh amendment states that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the

United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. Because the eleventh amendment was designed to "countermand[ed] any judicial inclination to interpret article III as a self-executing abrogation of state immunity from suit ... the Supreme Court, in deciding eleventh amendment cases, has focused not on the language of the eleventh amendment, but on the concept of sovereign immunity of which it is a reminder and 'exemplification.' " Tribe, American Constitutional Law s 3-25 (2nd ed. 1988).

FN3. Because an action against a state official in his official capacity is treated as an action against the state, See Kentucky v. Graham, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114

(1985), the court will not address the interests of each defendant separately.

4. Initially, this approach led to an expansion of eleventh amendment immunity beyond the express terms of the amendment. See Hans v. Louisiana, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890) (Eleventh Amendment protects State from suit instituted by one of its own citizens even if action arises under federal law). More recently, courts have defined a number of situations in which a federal court may assume jurisdiction of claims against a State. Foremost among these doctrines is the rule of Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), which allows a court to award prospective injunctive relief against state officials acting in their official capacity. There is no question that the court may award

injunctive relief against defendants Hayes and Beam; nonetheless, the plaintiffs offer several arguments in support of their position that monetary relief is available in this instance. [FN4] Those contentions will be considered seriatim.

FN4. In their memorandum on remedy, the plaintiffs reference a number of issues regarding the applicability of the eleventh amendment. However, it is evident from that pleading that the only eleventh amendment issues before this court concern the doctrines of waiver and pendant claim jurisdiction. Hence, only those contentions will be considered here.

5. Initially, the plaintiffs aver that the defendants have waived their eleventh amendment immunity by actively participating in this action. The Supreme

Court has stated that although a state may waive its constitutional immunity from suit by entering a general appearance in federal litigation, such a waiver will not be lightly inferred. Petty v. Tennessee-Missouri Bridge Commission 359 U.S. 275, 79 S.Ct. 785, 3 L.Ed.2d 804 (1959). Courts interpreting this notion of waiver have concluded that a state does not waive its eleventh amendment immunity by merely entering a general appearance and defending an action on the merits. Aerojet-General Corp. v. Askew, 453 F.2d 819 (5th Cir.1971), cert. den. 409 U.S. 892, 93 S.Ct. 110, 34 L.Ed.2d 149 (1972). In support of their position the plaintiffs point out a number of activities undertaken by the defendants during their defense of this action; however, the plaintiffs have not produced any evidence of an affirmative waiver of eleventh amendment

immunity such as the filing of a counterclaim. See Mohegan Tribe v. State of Connecticut, 528 F.Supp. 1359 (D.Conn.1982). Further, in light of the limited powers granted to the Coastal Council by S.C.Code Ann. s 48-39-50, there is no evidence indicating that any of these defendants possess the capacity to waive the state's immunity. Accordingly, the court concludes that the defendants' participation in this action does not amount to a waiver of their constitutional immunity. 6. Next, the plaintiffs assert that the South Carolina Legislature's enactment of its own just compensation provision and the statute giving rise to these proceedings constitutes a waiver of the defendants immunity. The state may waive its eleventh amendment immunity by enacting a statute to that effect. Ford Motor Co., v. Dept. of Trea-

sury of Indiana, 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1945). However, it has long been the rule of this district "that a State's consent to suit in Federal Court ... must be clearly and unmistakenly given." Southern Railway Company v. South Carolina State Highway Department, 246 F.Supp. 435 (E.D.S.C.1965). Based upon that principle, the court in Southern Railway concluded that the enactment of the just compensation provision *1172 of the South Carolina Constitution does not amount to a waiver of the state's eleventh amendment immunity. Id. at 439. The plaintiffs have offered no rationale for the reversal of this precedent, and so it is dispositive of their contention to the contrary. Similarly, neither the South Carolina Coastal Zone Act of 1977 nor the more recent Beachfront Management Act clearly evinces a desire on the part of

the legislature to waive the state's sovereign immunity. Rather, both s 48-39-180 and s 48-39-290 provide that actions arising under the legislation should be filed in the appropriate state tribunal. Therefore, the court concludes that neither the enactment of the just compensation provision of the South Carolina Constitution nor the passage of the coastal tidelands and wetlands legislation amounts to a waiver of the eleventh amendment. 7. Third, the plaintiffs assert that pursuant to the doctrine of pendant claim jurisdiction damages may be assessed against the defendants under S.C.Code Ann. s 48-39-290. The doctrine of pendant claim jurisdiction provides that once "a federal court obtains jurisdiction over a federal claim, it may adjudicate other related claims over which the court otherwise would not have jurisdiction." Pennhurst

State School & Hospital v. Halderman, 465 U.S. 89, 117, 104 S.Ct. 900, 917, 79 L.Ed.2d 67 (1984). Nonetheless, if the pendant claim charges the state, or one of its officials acting in his official capacity, with a violation of state law, the eleventh amendment precludes a federal court from granting relief based upon the pendant claim. Id. at 121, 104 S.Ct. at 919. As outlined above, the plaintiffs have offered no support for their position that the defendants have waived their immunity, and thus, the holding of Pennhurst prevents this court from awarding the monetary relief provided in s 48-39-290 against the defendants.

CONCLUSION: Accordingly, having concluded that the defendants are immune from an award of money damages by virtue of the eleventh amendment, and that the plaintiffs' sole remedy is prospec-

tive injunctive relief against the individual defendants acting in their official capacity, it is ORDERED, that the defendant John C. Hayes, III, in his official capacity as Chairman of the South Carolina Coastal Council, and the defendant H. Wayne Beam, in his official capacity as Executive Director of the South Carolina Coastal Council, and their successors in those official positions, be, and the same are hereby, enjoined from enforcing any construction prohibition as to vacant lots under the Coastal Management Act against the plaintiffs, their heirs, assigns, and devisees, with respect to the property currently owned by the plaintiffs and described more particularly as Lot No. 104 of the Hilton Head Beach Subdivision No. 1.

AND IT IS SO ORDERED.

Item 3.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

BEAUFORT DIVISION

CIVIL ACTION #D:88-2055-1

ORDER

JOHN V. ESPOSITO, et. al.,

Plaintiffs,

vs.

THE SOUTH CAROLINA COASTAL COUNCIL

et al.,

Defendants

This is an action charging the defendants with violations of the fifth amendment to the United States Constitution. Specifically, the plaintiffs contend that the enactment of the 1988 amendments to Title 48, Chapter 39 of the Code of Laws of South Carolina 1976 (48-39-270 through 48-39-360) violates the due process and just compensation provisions of the fifth amendment. Originally, the defendants denied all material allegations of the complaint; however, prior to trial, the parties stipulated to all of the relevant facts. Those stipulations are adopted as the factual findings of the court and they are incorporated into this order by reference. (See exhibits 1 and 2 attached).[15]

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[15]The stipulations marked as Exhibit 1 contain references to the affidavits of Chris Jones, Dr. Per Bruun, Dr. Robert Dolan, Steven Linsday, and Steven Moore.

On September 5, 1989, the parties appeared before this court, sitting without a jury, for oral argument on the legal issues. The court, having considered the stipulated facts and the proposed findings of fact and conclusions of law submitted by the parties, makes the following Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

CONCLUSIONS OF LAW

1. This court has jurisdiction over the parties to this action.

(Ex. 1, Para. XLVIL). These affidavits contain conflicting expert testimony regarding various factual issues which are not addressed in the stipulations. Obviously, because the court has not had an opportunity to hear the testimony of these witnesses, their credibility cannot be evaluated at this time. Hence, this evidence will not be relied upon or incorporated into this order.

2. This court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §1331.

THE TAKINGS CLAUSE CLAIM

3. As a preliminary mater, the court feels compelled to note that the plaintiffs' claim under the takings clause is mature. The Supreme Court has stated that

> [g]iven the "essentially ad hoc-,factual inquir[y]" involved in the takings analysis, ... we have found it particularly important in takings cases to adhere to our admonition that "the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary."

Pennell v. San Jose, _____ U.S. ____, 108 S. Ct. 849 (1988). The facts of record reveal that although the plaintiffs have not petitioned for a change in the baseline or the setback line, such a request

would be futile because the defendants have taken the position that those lines are not subject to change. (Ex. 1, Para. XXXVI). Moreover, as evidenced by the South Carolina Supreme Court's refusal to accept questions certified to it by this court on July 21, 1989, there is significant uncertainty as to the availability of an inverse condemnation action in state court. Hence, the takings issue is ripe for resolution by this tribunal.

4. The final clause of the fifth amendment prohibits the taking of private property "for public use, without just compensation." U.S. Const. amend. V. When determining whether or not the terms of this prohibition have been transgressed, the Supreme Court has traditionally examined the character of the government action and the economic impact of that action on the property owner. Penn-

sylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Penn Central Transportation Company et al. v. City of New York et al., 438 U.S. 104 (1978); Nollan v. California Coastal Commission, _____ U.S. _____, 107 S.Ct. 3141 (1987). The Court has long adhered to the view that a particular land use regulation does not constitute "a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'" Nollan, _____ U.S. at _____, 107 S.Ct. at 3146.

5. The state purpose of the challenged statutes is to protect South Carolina's beaches (Ex. 1, Para. IV), and it is beyond dispute that this is an objective in which the state has an important interest. The beaches are a valuable resource providing both recreational opportunities and tourist revenue to the state. (See

Ex. 1, Para. XLII, XLIV). The thrust of the plaintiffs' claim is that the statutes at issue are not substantially related to the attainment of this end; however, that contention is not supported by the record. Essentially, the statutes purport to preserve the beaches by restoring the beach//dune system to its natural equilibrium. (Ex. 1, Para. IV). Further, the legislature decided that the best method of rejuvenating the beach/dune system is by preventing all new construction and/or reconstruction in that area. (Ex. 1, Para. XXIV-XXV). The internal logic of this scheme is apparent, and thus the court concludes that the statutory restrictions are substantially related to

the important goal of preserving South Carolina's beaches.[16]

6. Additionally, the plaintiffs have failed to demonstrate an economic injury sufficient to invoke the protection of the takings clause. When considering this aspect of the takings inquiry, a court must draw a "distinction between a claim that the mere enactment of a statute constitutes a taking and a claim that the particular impact of government action on a specific piece of property requires the payment of just compensation. Keystone Bituminous Coal Association v. DeBenedictis, _____ U.S. _____, 107 S.Ct. 1232, 1247 (1987). In actions involving a facial challenge to the validity of regula-

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[16]This conclusion has been reached without the benefit of the technical evidence concerning the validity of the methods used to define the area encompassed by the beach/dune system. See fn. 1.

tory activity, the Court has held that a statute regulating the use of private property effects a taking only if the mere enactment of the legislation denies an owner economically viable use of his land. Hodel v. Virginia Surface Mining and Reclamation Association, Inc., 452 U.S. 264, 295-296 (1981) (citations omitted); Keystone, ____ U.S. at _____, 107 S.Ct. at 12447 (citing Hodel[17] However, in an action contesting the enforcement of a

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[17]The distinction between the doctrine of ripeness and the concept of a facial challenge to legislative action merits some discussion. In this context, the ripeness inquiry is designed to ascertain whether or not the plaintiff has alternate means of obtaining the relief requested, such as seeking a variance or filing an inverse condemnation suit in state court. Naegele Outdoor Advertising, Inc. v. City of Durham, 844 F.2d 172 (4th Cir. 1988). Conversely, the facial challenge concept allows the plaintiff to question the constitutionality of a statute without showing a concrete injury resulting from the enforcement of the statute. Keystone, _____ U.S. at _____, 107 S.Ct. at 1246.

statute,t he inquiry focuses on the economic impact of a specific application of the regulation. Penn Central, 438 U.S. at 136.

7. The stipulated facts reveal that these plaintiffs have suffered no concrete injury as a result of the defendants' application of the statutes. The statute prevents any new construction in the area twenty (20) feet landward of the baseline. (Ex. 1, Para. XXIV). Further, with regard to habitable structures currently located in that area, the statutes prevent reconstruction of those dwellings if they are destroyed beyond repair. (Ex. 1, Para. XXV). While it is undisputed that the plaintiffs' homes are located within this no construction zone (Ex. 1, Para. XXXII), there is no evidence indicating that any of them has been denied permission to build, or rebuild, any structure or recre-

ational amenity within this area. Additionally, although the record contains evidence that several of the plaintiffs have been unable to sell their homes (Ex. 2, Para. XLII), that situation is not the result of any direct restriction on alienability contained in the statutes. Rather, this situation is the result of a chilling effect on the real estate market caused by the enactment of the statutes. Since the plaintiffs have not suffered any adverse consequences as a result of the enforcement of the statutes, the court must decide if the enactment of the statutes has deprived them of economically viable use of their land.[18]

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[18]The record also demonstrated that the Beaufort County Tax Assessor has reduced the assessed value of the plaintiffs' properties by thirty-five percent (35%) as a result of the statutes at issue. (Ex. 2, Pra XXIX. While this action may reflect some diminution in the plaintiffs' property values, this action in

8. Application of these principles to the instant action indicates that the enactment of the statutes at issue does not amount to an uncompensated taking. As the stipulated facts indicate, the Town of Hilton Head Island has been developed to offer residents and vacationers an exclusive resort environment (Ex. 1, Para. XLIII). The economic utility of this scheme is reflected in the growing popularity of the town among those visiting South Carolina. (Ex. 1, Para. XLIV. Consistent with this concept, all of the plaintiffs used their properties as either permanent residences or vacation quarters prior to the enactment of the statutes.

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itself represents a benefit of the new law in that the plaintiffs' tax burden has been reduced. As for any reduction of the fair market values of the affected properties, this untoward result is merely another aspect of the chilling effect discussed in the body of the opinion.

(Ex. 2, Para. I-XXV). Furthermore, it is clear that the plaintiffs continue to use their property in the same manner since the occurrence of the events that gave rise to this action. (Ex. 1, Para. X-XXIX). Consequently, as the enactment of the statutes did not deprive the plaintiffs of economically viable use of their real estate, they are not entitled to relief under the takings clause of the fifth amendment.

THE DUE PROCESS CLAUSE CLAIM

9. Alternatively, the plaintiffs assert that the enactment of the statutes violated the due process clause of the fifth amendment. In pertinent part that amendment states that "[n]ho person shall be ... deprived of life, liberty, or property without due process of law ...." U.S. Const. amend. V. This limitation on

the power of the federal government is likewise applicable to the states under the fourteenth amendment. U.S. Const amend XIV, § 1. A legislative restriction on the use of privately owned property does not violate the due process clause unless it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, moral or general welfare." First Assembly of God v. City of Alexandria, Virginia, 739 F.2d 942, 944 (4th Cir. 1984), citing Village of Euclid v. Ambler Realty Co., 272 U.S> 365 (1926); See also Spring Branch Mining Co. v. United Mine Workers of America, 854 F.2d 37 (4th Cir. 1988). As stated in the previous section, the statutes at issue are substantially related to the important state interest in preserving the beaches; thus, the plaintiffs' due process claim must fail.

10. Finally, the record contains a significant amount of evidence concerning the South Carolina Legislature's delegation of rule-making authority to the defendants. To the extent that this evidence is intended to support the plaintiffs' due process claim, the court concludes that this action does not render the statutes arbitrary and capricious. Moreover, to the extent that this evidence could be construed as a challenge to the rules and regulations promulgated by the defendants, the court does not reach that issue because it was not specifically raised by either party.

CONCLUSION

Accordingly, based upon the foregoing, it is

ORDERED, that the Clerk of Court enter judgment in favor of the defendants

as to the fifth amendment takings claim. It is

ORDERED FURTHER, that the Clerk of Court enter judgment in favor of the defendants as to the fifth amendment due process claim.

AND IT IS SO ORDERED.

Item 4

Relevant portions of the Beachfront Management Act

s 48-39-20. Legislative declaration of findings.

The General Assembly finds that:

(A) The coastal zone is rich in a variety of natural, commercial, recreational and industrial resources of immediate and potential value to the present and future well-being of the State.

(B) The increasing and competing demands upon the lands and waters of our coastal zone occasioned by population growth and economic development, including requirements for industry, commerce, residential development, recreation, extraction of mineral resources and fossil fuels, transportation and navigation, waste disposal and harvesting of fish, shellfish and other living marine resources have resulted in the decline or loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use and shoreline erosion.

(C) A variety of federal agencies presently operate land use controls and permit systems in the coastal zone. South Carolina can only regain control of the regulation of its critical areas by devel-

oping its own management program. The key to accomplishing this is to encourage the state and local governments to exercise their full authority over the lands and waters in the coastal zone.

(D) The coastal zone and the fish, shellfish, other living marine resources may be ecologically fragile and consequently extremely vulnerable to destruction by man's alterations.

(E) Important ecological, cultural, natural, geological and scenic characteristics, industrial, economic and historical values in the coastal zone are being irretrievably damaged or lost by ill-planned development that threatens to destroy these values.

(F) In light of competing demands and the urgent need to protect and to give high priority to natural systems in the coastal zone while balancing economic

interests, present state and local institutional arrangements for planning and regulating land and water uses in such areas are inadequate.

s 48-39-30. Legislative declaration of state policy.

(A) The General Assembly declares the basic state policy in the implementation of this chapter is to protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone and of all the people of the State.

(B) Specific state policies to be followed in the implementation of this chapter are:

(1) To promote economic and social improvement of the citizens of this State and to encourage development of coastal

resources in order to achieve such improvement with due consideration for the environment and within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development and provide adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone;

(2) To protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations; (3) To formulate a comprehensive tidelands protection program; (4) To formulate a comprehensive beach erosion and protection policy including the protection of necessary sand dunes.

(5) To encourage and assist state agencies, counties, municipalities and

regional agencies to exercise their responsibilities and powers in the coastal zone through the development and implementation of comprehensive programs to achieve wise use of coastal resources giving full consideration to ecological, cultural and historic values as well as to the needs for economic and social development and resources conservation. (C) In the implementation of the chapter, no government agency shall adopt a rule or regulation or issue any order that is unduly restrictive so as to constitute a taking of property without the payment of just compensation in violation of the Constitution of this State or of the United States. (D) Critical areas shall be used to provide the combination of uses which will insure the maximum benefit to the people, but not necessarily a combination of uses which will generate measur-

able maximum dollar benefits. As such, the use of a critical area for one or a combination of like uses to the exclusion of some or all other uses shall be consistent with the purposes of this chapter.

(E) It shall be the policy of the State to coordinate the coastal planning and management program effort with other coastal states and organizations of coastal states.

s 48-39-250. Legislative findings regarding the coastal beach/dune system.

The General Assembly finds that:

(1) The beach/dune system along the coast of South Carolina is extremely important to the people of this State and serves the following functions: (a) protects life and property by serving as a

storm barrier which dissipates wave energy and contributes to shoreline stability in an economical and effective manner;

(b) provides the basis for a tourism industry that generates approximately two-thirds of South Carolina's annual tourism industry revenue which constitutes a significant portion of the state's economy. The tourists who come to the South Carolina coast to enjoy the ocean and dry sand beach contribute significantly to state and local tax revenues;

(c) provides habitat for numerous species of plants and animals, several of which are threatened or endangered. Waters adjacent to the beach/dune system also provide habitat for many other marine species; (d) provides a natural healthy environment for the citizens of South Carolina to spend leisure time

which serves their physical and mental well- being.

(2) Beach/dune system vegetation is unique and extremely important to the vitality and preservation of the system.

(3) Many miles of South Carolina's beaches have been identified as critically eroding.

(4) Chapter 39 of Title 48, Coastal Tidelands and Wetlands, prior to 1988, did not provide adequate jurisdiction to the South Carolina Coastal Council to enable it to effectively protect the integrity of the beach/dune system. Consequently, without adequate controls, development unwisely has been sited too close to the system. This type of development has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property. It is in both the public and private in-

terests to protect the system from this unwise development.

(5) The use of armoring in the form of hard erosion control devices such as seawalls, bulkheads, and rip-rap to protect erosion-threatened structures adjacent to the beach has not proven effective. These armoring devices have given a false sense of security to beachfront property owners. In reality, these hard structures, in many instances, have increased the vulnerability of beachfront property to damage from wind and waves while contributing to the deterioration and loss of the dry sand beach which is so important to the tourism industry.

(6) Erosion is a natural process which becomes a significant problem for man only when structures are erected in close proximity to the beach/dune system. It

is in both the public and private interests to afford the beach/dune system space to accrete and erode in its natural cycle. This space can be

provided only by discouraging new construction in close proximity to the beach/dune system and encouraging those who have erected structures too close to the system to retreat from it.

(7) Inlet and harbor management practices, including the construction of jetties which have not been designed to accommodate the longshore transport of sand, may deprive downdrift beach/dune systems of their natural sand supply. Dredging practices which include disposal of beach quality sand at sea also may deprive the beach/dune system of much-needed sand. (8) It is in the state's best interest to protect and to promote increased public access to South Caro-

lina's beaches for out-of-state tourists and South Carolina residents alike.

(9) Present funding for the protection, management, and enhancement of the beach/dune system is inadequate.

(10) There is no coordinated state policy for post-storm emergency management of the beach/dune system.

(11) A long-range comprehensive beach management plan is needed for the entire coast of South Carolina to protect and manage effectively the beach/dune system, thus preventing unwise development and minimizing man's adverse impact on the system.

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this

act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

s 48-39-260. Policy statement.

In recognition of its stewardship responsibilities, the policy of South Carolina is to:

(1) protect, preserve, restore, and enhance the beach/dune system, the highest and best uses of which are declared to provide:

(a) protection of life and property by acting as a buffer from high tides, storm surge, hurricanes, and normal erosion;

(b) a source for the preservation of dry sand beaches which provide recreation and a major source of state and local business revenue; (c) an environment which harbors natural beauty and enhances the well-being of the citizens of this State and its visitors;

(d) natural habitat for indigenous flora and fauna including endangered species;

(2) create a comprehensive, long-range beach management plan and require local comprehensive beach management plans for the protection, preservation, restoration, and enhancement of the beach/dune system. These plans must promote wise use of the state's beachfront to include a

gradual retreat from the system over a forty-year period;

(3) severely restrict the use of hard erosion control devices to armor the beach/dune system and to encourage the replacement of hard erosion control devices with soft technologies as approved by the South Carolina Coastal Council which will provide for the protection of the shoreline without long- term adverse effects;

(4) encourage the use of erosion-inhibiting techniques which do not adversely impact the long-term well-being of the beach/dune system; (5) promote carefully planned nourishment as a means of beach preservation and restoration where economically feasible;

(6) preserve existing public access and promote the enhancement of public access to assure full enjoyment of the

beach by all our citizens including the handicapped and encourage the purchase of lands adjacent to the Atlantic Ocean to enhance public access;

(7) involve local governments in long-range comprehensive planning and management of the beach/dune system in which they have a vested interest; (8) establish procedures and guidelines for the emergency management of the beach/dune system following a significant storm event.

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing

as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

s 48-39-290. Restrictions on construction or reconstruction seaward of the baseline or between the baseline and the setback line; exceptions; special permits.

(A) No new construction or reconstruction is allowed seaward of the baseline except:

(1) wooden walkways no larger in width than six feet;

(2) small wooden decks no larger than one hundred forty-four square feet;

(3) fishing piers which are open to the

public. Those fishing piers with their associated structures including, but not limited to, baitshops, restrooms, restaurants, and arcades which existed September 21, 1989, may be rebuilt if they are constructed to the same dimensions and utilized for the same purposes and remain open to the public. In addition, those fishing piers with their associated structures which existed on September 21, 1989, that were privately owned, privately maintained, and not open to the public on this date also may be rebuilt and used for the same purposes if they are constructed to the same dimensions;

(4) golf courses;

(5) normal landscaping;

(6) structures specifically permitted by special permit as provided in subsection (D);

(7) pools may be reconstructed if they are landward of an existing, functional erosion control structure or device.

A permit must be obtained from the council for items (2) through (7). (B) Construction, reconstruction, or alterations between the baseline and the setback line are governed as follows:

(1) Habitable structures:

(a) New habitable structures: If part of a new habitable structure is constructed seaward of the setback line, the owner must certify in writing to the council that the construction meets the following requirements: (i) The habitable structure is no larger than five thousand square feet of heated space. The structure must be located as far landward on the property as practicable. A drawing must be submitted to the council showing a footprint of the structure

on the property, a cross section of the structure, and the structure's relation to property lines and setback lines which may be in effect. No erosion control structure or device may be incorporated as an integral part of a habitable structure constructed pursuant to this section.

(ii) No part of the building is being constructed on the primary oceanfront sand dune or seaward of the baseline.

(b) Habitable structures which existed on the effective date of Act 634 of 1988 or constructed pursuant to this section:

(i) Normal maintenance and repair of habitable structures is allowed without notice to the council.

(ii) Additions to habitable structures are allowed if the additions

together with the existing structure do not exceed five thousand square feet of heated space. Additions to habitable structures must comply with the conditions of new habitable structures as set forth in subitem (a). (iii) Repair or renovation of habitable structures damaged, but not destroyed beyond repair, due to natural or manmade causes is allowed. (iv) Replacement of habitable structures destroyed beyond repair due to natural causes is allowed after notification is provided by the owner to the council that all of the following requirements are met:

a. The total square footage of the replaced structure seaward of the setback line does not exceed the total square footage of the original structure seaward of the setback line. The linear footage of the replaced structure

parallel to the coast does not exceed the original linear footage parallel to the coast.

b. The replaced structure is no farther seaward than the original structure.

c. Where possible, the replaced structure is moved landward of the setback line or, if not possible, then as far landward as is practicable, considering local zoning and parking regulations.

d. The reconstruction is not seaward of the baseline unless permitted elsewhere in Sections 48-39-250 through 48-39-360.

(v) Replacement of habitable structures destroyed beyond repair due to manmade causes is allowed provided the rebuilt structure is no larger than the original structure it replaces and is constructed as far landward as possi-

ble, but the new structure must not be farther seaward than the original structure.

(2) Erosion control devices:

(a) No new erosion control structures or devices are allowed seaward of the setback line except to protect a public highway which existed on the effective date of this act.

(b) Erosion control structures or devices which existed on the effective date of this act must not be repaired or replaced if destroyed: (i) more than eighty percent above grade through June 30, 1995; (ii) more than sixty-six and two-thirds percent above grade from July 1, 1995, through June 30, 2005; (iii) more than fifty percent above grade after June 30, 2005. (iv) Damage to seawalls and bulkheads must be judged on the percent of the struc-

ture remaining intact at the time of damage assessment. The portion of the structure or device above grade parallel to the shoreline must be evaluated. The length of the structure or device parallel to the shoreline still intact must be compared to the length of the structure or device parallel to the shoreline which has been destroyed. The length of the structure or device parallel to the shoreline determined to be destroyed divided by the total length of the original structure or device parallel to the shoreline yields the percent destroyed. Those portions of the structure or device standing, cracked or broken piles, whalers, and panels must be assessed on an individual basis to ascertain if these components are repairable or if replacement is required. Revetments must be judged on the

extent of displacement of stone, effort required to return these stones to the prestorm event configuration of the structure or device, and ability of the revetment to retain backfill material at the time of damage assessment. If the property owner disagrees with the assessment of a registered professional engineer acting on behalf of the council, he may obtain an assessment by a registered professional engineer to evaluate, as set forth in this item, the damage to the structure or device. If the two assessments differ, then the two engineers who performed the assessments must select a registered professional engineer to perform the third assessment. If the first two engineers are unable to select an engineer to perform the third assessment, the clerk of court of the county where the

structure or device lies must make the selection of a registered professional engineer. The determination of percentage of damage by the third engineer is conclusive.

(v) The determination of the degree of destruction must be made on a lot by lot basis by reference to county tax maps.

(vi) Erosion control structures or devices must not be enlarged, strengthened, or rebuilt but may be maintained in their present condition if not destroyed more than the percentage allowed in Section 48-39-290(B)(2)(b)(i), (ii), and (iii). Repairs must be made with materials similar to those of the structure or device being repaired. (c) Erosion control structures or devices determined to be destroyed more than the percentage al-

lowed in Section 48-39-290(B)(2)(b)(i), (ii), and (iii) must be removed at the owner's expense. Nothing in this section requires the removal of an erosion control structure or a device protecting a public highway which existed on the effective date of Act 634 of 1988.

(d) The provisions of this section do not affect or modify the provisions of Section 48-39-120(C).

(3) Pools, as defined in Section 48-39-270(12):

(a) No new pools may be constructed seaward of the setback line unless the pool is built landward of an erosion control structure or device which was in existence or permitted on the effective date of this act and is built as far landward as practical.

(b) Normal maintenance and repair is allowed without notice to the council.

(c) If a pool, existing on July 1, 1988, is destroyed beyond repair, as determined by the council pursuant to Section 48-39-270(11), it may be replaced if the owner certifies in writing to the council that: (i) It is moved as far landward as practical. This determination of practicality must include the consideration of local zoning requirements. (ii) It is rebuilt no larger than the destroyed pool. (iii) It is constructed according to acceptable standards of pool construction and cannot be reinforced in a manner so as to act as an erosion control structure or device.

(d) If a pool is not destroyed beyond repair as determined by the council pursuant to Section 48-39-270(11) but the owner wishes to replace it, the owner may do so if:

(i) The dimensions of the pool are not enlarged.

(ii) The construction conforms to sub-subitem (iii) of subitem (c). (4) All other construction or alteration between the baseline and the setback line requires a council permit. However, the council, in its discretion, may issue general permits for construction or alterations where issuance of the general permits would advance the implementation and accomplishment of the goals and purposes of Sections 48-39-250 through 48-39- 360.

(C) (1) Notwithstanding the provisions relating to new construction, a person, partnership, or corporation owning real property that is affected by the setback line as established in Section 48-39-280 may proceed with construction pursuant to a valid building permit issued as of

the effective date of this section. The person, partnership, or corporation may proceed with the construction of buildings and other elements of a master plan, planned development, or planned unit development notwithstanding the setback line established in this chapter if the person, partnership, or corporation legally has begun a use as evidenced by at least one of the following: (a) All building permits have been applied for or issued by a local government before July 1, 1988.

(b) There is a master plan, planned development, or planned unit development:

(i) that has been approved in writing by a local government before July 1, 1988; or

(ii) where work has begun pursuant to approval as evidenced by the com-

pletion of the utility and infrastructure installation designed to service the real property that is subject to the setback line and included in the approved master plan, planned development, or planned unit development.

(2) However, repairs performed on a habitable structure built pursuant to this section are subject to the guidelines for repairs as set forth in this section.

(3) Nothing in this section prohibits the construction of fishing piers or structures which enhance beach access seaward of the baseline, if permitted by the council.

(D) Special permits:

(1) If an applicant requests a permit to build or rebuild a structure other than an erosion control structure or device seaward of the baseline that is

not allowed otherwise pursuant to Sections 48-39-250 through 48-39-360, the council may issue a special permit to the applicant authorizing the construction or reconstruction if the structure is not constructed or reconstructed on a primary oceanfront sand dune or on the active beach and, if the beach erodes to the extent the permitted structure becomes situated on the active beach, the permittee agrees to remove the structure from the active beach if the council orders the removal. However, the use of the property authorized under this provision, in the determination of the council, must not be detrimental to the public health, safety, or welfare. (2) The council's Permitting Committee is the committee to consider applications for special permits.

(3) In granting a special permit, the committee may impose reasonable additional conditions and safeguards as, in its judgment, will fulfill the purposes of Sections 48-39-250 through 48-39-360.

(4) A party aggrieved by the committee's decision to grant or deny a special permit application may appeal to the full council pursuant to Section 48-39-150(D).

(E) The provisions of this section and Section 48-39-280 do not apply to an area in which the erosion of the beaches located in its jurisdiction is attributed to a federally authorized navigation project as documented by the findings of a Section 111 Study conducted under the authority of the federal Rivers and Harbors Act of 1968, as amended by the federal Water Resources Development Act of 1986, and approved by the United States Army

Corps of Engineers. Nothing contained in this subsection makes this area ineligible for beach renourishment funds.

The baseline determined by the local governing body and the council is the line of erosion control devices and structures and the council retains its jurisdiction seaward of the baseline. In addition, upon completion of a council approved beach renourishment project, including the completion of a sand transfer system if necessary for long-term stabilization, an area under a Section 111 Study becomes subject to all the provisions of this chapter. For the purposes of this section, a beach nourishment project stabilizing the beach exists if a successful restoration project is completed consisting of at least one hundred fifty cubic yards a foot over a length of five and one-half miles, with

a project design capable of withstanding a one-in-ten-year storm, as determined by council, and renourishment is conducted annually at a rate, agreed upon by the council and local governing body, equivalent to that which would occur naturally if the navigation project causing the erosion did not exist. If the two parties cannot agree, then the council must obtain the opinion of an independent third party.

Any habitable structure located in an area in which the erosion of the beaches located in its jurisdiction is attributed to a federally authorized navigation project as documented by the findings of a Section 111 Study, which was in existence on September 21, 1989, and was over forty years old on that date and is designated by the local governing body as an historical landmark may be rebuilt

seaward of the baseline if it is rebuilt to the exact specifications, dimensions, and exterior appearance of the structure as it existed on that date.